UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARYFRANCES BAILEY, Plaintiff, v. JO ANNE B. BARNHART, Commissioner of Social Security Defendant.	CASE NO. C05-1496-JCC REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Mary Frances Bailey proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance (DI) benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that this matter be AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX,1943.[1] She completed high school and an associate's degree

[1] Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

in business. Plaintiff previously worked as an information technology specialist and business analyst for U.S. West/Qwest. She applied for SSI in May 2001, alleging disability since April 2, 2001 due to the residual effects of a stroke she suffered on that same date and blood clotting. Her application was denied initially and on reconsideration, and she timely requested a hearing.

ALJ Verrell Dethloff held a hearing on September 29, 2004, taking testimony from plaintiff and her daughter, Mary Wideman-Williams. (AR 524-50.) He issued a decision finding plaintiff not disabled on December 28, 2004. (AR 14-24.)

Plaintiff timely appealed. On August 19, 2005, the Appeals Council denied her request for review. (AR 6-9.) Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since her alleged onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's residuals from a right cerbrovascular accident/lacunar stroke with left hemiparesis severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairment did not meet or equal the criteria for any listed impairments. If a claimant's impairments do not meet or equal a listing, the Commissioner must assess RFC and determine at step four whether the claimant has demonstrated an inability to perform past relevant

work. The ALJ found plaintiff able to perform her past relevant work as an information technology specialist and business analyst for a telephone company. If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. Finding plaintiff not disabled at step four, the ALJ did not proceed to step five.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues that the ALJ should have found her blood disorder and cognitive residual difficulties to be severe impairments at step two, did not properly consider the medical evidence in the record, failed to give clear and convincing reasons for discrediting her, improperly dismissed lay witness evidence, and should have called a vocational expert. She asks that the Court remand this matter for an award of benefits or, alternatively, for further administrative proceedings. The Commissioner argues that the ALJ's decision is supported by substantial evidence and should be affirmed. For the reasons described below, the undersigned agrees with the Commissioner that this matter should be affirmed.

Step Two

At step two, plaintiff must make a threshold showing that her medically determinable impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. § 416.920(c). "Basic work activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 416.921(b). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting Social Security Ruling (SSR) 85-28). "[T]he step two inquiry is a de minimis screening device to dispose of groundless claims." *Id.* (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the "combined effect" of an individual's impairments in considering severity. *Id.*

In this case, the ALJ found only plaintiff's physical residuals from a right cerbrovascular accident/lacunar stroke with left hemiparesis severe. Plaintiff argues that the ALJ should have also found her blood disorder and cognitive residual impairments severe, and asserts that those impairments directly affected her ability to perform her past work.

A. Blood Disorder

The blood disorder refers to plaintiff's clotting abnormality, due to Leiden factor V deficiency. She asserts that this condition required her to stand and move around sooner than every two hours in order to prevent blood clotting and another stroke (AR 333, 537), that she had to rest for thirty minutes after sitting for two hours (AR 114), that she was unable to take hormone replacements, resulting in her inability to sleep well at night (AR 105, 133, 135), and that she was fatigued and napped daily for about two hours (*see, e.g.*, AR 100, 445, 485, 521.)

The Commissioner asserts that the evidence as a whole indicates that medication controlled plaintiff's blood clotting and that this impairment did not significantly limit her ability to work. For example, although plaintiff told Dr. Anita Peterson on November 21, 2001 that she had to stand and move around every two hours to avoid a blood clot, Dr. Eileen Johnston, on November 16, 2001, found that plaintiff had "no recurrent thromboembolic disease on therapeutic doses of Coumadin for her factor V Leiden." (AR 329, 333.) (*See also* AR 468 (Dr. William Likosky stated in a May 2002 report that plaintiff was "being managed" for her Leiden deficiency and that "[t]he clinical manifestations of [her] stroke have waned to virtually nothing.") and AR 371 (Dr. David A. White, in a June 2003 report, found plaintiff had "[c]hronic anti-coagulation need[,] but stated that she "has really done quite well with anti-coagulation[.]")) The Commissioner also, like the ALJ, takes notice that jobs such as plaintiff's past work usually provide for breaks at two-hour intervals. *See* Social Security Ruling (SSR) 96-9p ("In order to perform a full range of sedentary work, an individual must be able to remain in a seated position for approximately 6 hours of an 8-hour workday, with a morning break, a lunch period, and an afternoon break at approximately 2-hour intervals.") and (AR 22 (noting "most jobs allow a break every two hours" and stating that plaintiff's need to move every two hours would not interfere with her past work) (citing Social Security Program Operations Manual System (POMS) DI 25020.010 B 2 (mental abilities required for any job include: "The ability to maintain concentration and attention for extended periods (the approximately 2-hour segments between arrival and first break, lunch, second break, and departure).")).

Plaintiff responds that the ALJ was not qualified as a vocational expert to make the determination regarding two-hour breaks, and points to her testimony that her former job required

her to sit for approximately seven out of eight hours (AR 535), and her statement on a questionnaire that she spent at least thirty minutes resting after sitting or standing for two hours (AR 114). Plaintiff also objects to the Commissioner's argument that her coagulation limitation is controlled through medication as an improper post hoc rationalization. *See Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003) (court erred in relying on evidence the ALJ did not discuss).

Significantly, plaintiff points to no evidence from a physician or other medical professional supporting her asserted need to move approximately every two hours. Instead, she relies on evidence either reflecting her self-report or taking the form of witness statements. As discussed below, however, the ALJ's decision to find plaintiff and her witnesses not entirely credible is supported by substantial evidence. Moreover, the ALJ specifically accounted for plaintiff's asserted need to move every two hours at step four. (*See* AR 22.) Also, although plaintiff points to evidence from her treating physician, Dr. Rayburn Lewis, supporting her claims regarding fatigue and naps, the undersigned also below finds the ALJ's decision to not give weight to Dr. Lewis's opinion supported by substantial evidence. Accordingly, plaintiff fails to demonstrate any error with respect to her blood disorder at step two.

B. Cognitive Limitations

Plaintiff points to witness testimonials supporting her claim of cognitive limitations. (*See, e.g.*, AR 97, 101, 124, 139, 141.) She notes that memory testing by Dr. Peterson in November 2001 reflected she had difficulty understanding some instructions, had a slower learning curve than would be expected in one aspect of the testing, that her recall was not as strong as her recognition, and that Dr. Peterson expected "further improvement in cognitive functioning, post-CVA." (AR

334-35.) Also, although acknowledging that Dr. Peterson concluded she had no mental impairment severely limiting her ability to work, plaintiff notes that Dr. Peterson did not specifically opine that she could return to her job as a software technician and analyst. (AR 336.)

The Commissioner argues that the record contradicts plaintiff's allegation of severe cognitive deficits. She notes that, in May 2001, plaintiff reported to Dr. David Tempest that "cognitively she is doing well . . . reading, doing finances, managing her affairs, parenting her 17-year-old son[,]" and that Dr. Peterson found average and above average psychological test results and no severe impairment. (AR 312 and 333-36.)

The ALJ addressed the question of cognitive limitations as follows:

> I do not find that the claimant has a severe mental impairment. Testing has not revealed any significant limitations. The claimant's sister specifically stated that the claimant had no mental problems when she completed a questionnaire concerning the claimant a year after the claimant's stroke. Two years later, she said that the claimant's condition had not changed, but reported numerous mental problems; this inconsistency reflects on the credibility of the testimony offered. There is minimal evidence of any mental problems in the record. The claimant has traveled with her church choir, and she reports that she worked part time. Dr. Lewis has also stated that the claimant's condition is unchanged from 2002. In 2002, no one was reporting any significant cognitive difficulties. Indeed, the claimant was able to function well cognitively even during her hospitalization after the stroke. The claimant is able to drive, shop, and cook. There is no objective evidence other than lay statements made several years after the stroke, which indicate that the claimant had any mental limitations. Doctors for the State Agency found no severe mental impairment (exhibit 12F). Dr. Peterson had the claimant complete memory testing and made no mental diagnosis (exhibit 11F).

(AR 19.) The ALJ also rejected the opinion of Dr. Lewis that plaintiff was disabled, in part, due to cognitive limitations, stating objective evidence in his records, the records from other physicians, and plaintiff's activities of daily living did not support his conclusion. (*See* AR 19 and 22 (stating, *inter alia*, that Dr. Likosky – a neurologist, as compared to Dr. Lewis's internal

medicine specialty – noted the "clinical manifestations of the claimant's stroke had waned to virtually nothing.")).

Critically, as noted by the ALJ and the Commissioner, Dr. Peterson found plaintiff average to above average on testing and concluded "[n]o mental impairment severely limits her ability to work." (AR 335-36.) She also assessed plaintiff with a very high Global Assessment of Functioning (GAF) score of 85. (AR 335.) Also, as discussed below, the ALJ appropriately assessed the opinions of Dr. Lewis, plaintiff's credibility, and the testimony proffered by her witnesses. For these reasons, plaintiff also fails to demonstrate error at step two with respect to her alleged cognitive limitations.

Physicians' Opinions

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). Where the opinion of the treating physician is contradicted, and the non-treating physician's opinion is based on independent clinical findings that differ from those of the treating physician, the opinion of the non-treating physician may itself constitute substantial evidence. *See Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ to resolve this conflict. *Id.* Also,

the opinions of specialists are appropriately given more weight than non-specialists. *See Smolen*, 80 F.3d at 1285.

Plaintiff here contests the ALJ's assessment of the opinions of her treating physician, Dr. Lewis. The ALJ stated the following with respect to Dr. Lewis:

> On August 28, 2002, Dr. Lewis stated that the claimant was, in his opinion, incapable of full time duty, even at a light or sedentary status. He indicated that the claimant was so limited due to fatigue and balance problems. He felt that this could improve over time (exhibit 19F). This opinion has no proffered support on its face, and none can be gleaned from Dr. Lewis' records.
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> In October 2004, Dr. Lewis wrote that the claimant had moderate residuals from a left parietotemporal cerebrovascular accident including postural imbalance, fatigue, cognitive deficits and depression with coagulopathy requiring anticoagulation, osteoporosis and a history of a colon resection for diverticulosis as well as hyperlipidemia. He said that her condition was stable and unchanged from 2002. He said that she remained incapable of full time sedentary activity and that subtle cognitive changes remained a substantive barrier to her returning to productive activity (exhibit 21F). Objective evidence in Dr. Lewis' records, again, provide no support for this opinion.
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> Once again, I have considered the statement of Dr. Lewis that the claimant is limited to part time work due to fatigue, cognitive problems, and balance problems, but I give this opinion no weight. Dr. Lewis' treatment notes do not show frequent reports of these problems. Dr. Lewis is the claimant's primary care physician, but he is only an internal medicine specialist. The claimant has seen a number of specialists. Dr. Likosky is a neurologist, and he noted that the clinical manifestations of the claimant's stroke had waned to virtually nothing. It is for this reason that he turned treatment over to Dr. Lewis (Exhibit 18F, pp. 5-9). Dr. White, who is subcertified in hematology noted that the claimant appeared well and bright, she moved comfortably and her muscle strength was symmetric (Exhibit 16F, p. 3). Dr. Lewis' notes, the reports of Dr. White, Dr. Likosky, the claimant's activities of daily living, and the reviewing physicians for the State Agency all suggest that the claimant is not as limited as Dr. Lewis has indicated in his letter.

(AR 18-22.) (*See also* AR 19 (in finding plaintiff had no severe mental impairment, stating: "Dr. Lewis has also stated that the claimant's condition is unchanged from 2002. In 2002, no one was reporting any significant cognitive difficulties. Indeed, the claimant was able to function well cognitively even during her hospitalization after the stroke.")) The ALJ also more specifically addressed plaintiff's activities of daily living in assessing her credibility and witness statements (AR 19-22).

Pointing to documents in the record, plaintiff disputes the ALJ's assertion that Dr. Lewis's notes did not support his opinion regarding her inability to work. (*See* AR 363 (October 2001 note that left-side ataxia worse with fatigue and difficulties stepping up on footstool with left foot); AR 360 (March 2002 note that he would help her reapply for disability benefits); AR 513 (September 2002 note that plaintiff "still requires naps"); AR 443 (November 2002 note that her left hand grip was slightly weaker and she walked sparingly); AR 495 (June 2004 note that she had sleeping difficulties)). She also points to symptoms recorded by other doctors. (*See* AR 329 (Dr. Johnston, in November 2001, noted that she had some residual weakness in her left lower extremity and significant emotional impact in compromising her previously very active lifestyle); AR 334-35 (Dr. Peterson, in November 2001, noted some difficulty in understanding instructions, a slower learning curve than would be expected in one respect, and that her recall was weaker than her recognition); AR 468 (Dr. Likosky, in May 2002, noted "a virtually trivial drift of the left arm"); and AR 371 (Dr. White, in June 2003, noted fatigue in her muscle strength and that her left leg was a bit weaker)). She also points to the supportive reports of her witnesses.

As found by the ALJ, Dr. Lewis's notes do not provide sufficient support for his 2002 and 2004 conclusions regarding the degree of plaintiff's limitations. Moreover, the reports from other

doctors, including specialists, are not particularly helpful to plaintiff's argument. The November 2001 report from Dr. Johnson is dated much closer in time to plaintiff's April 2001 stroke than are the later letters from Dr. Lewis. Dr. Peterson's report, as indicated above, does not support plaintiff's claims. (*See* AR 333-36.) Nor is Dr. Likosky's May 2002 note helpful, pointing to a "virtually trivial" arm drift and stating that "[t]he clinical manifestations of [her] stroke [had] waned to virtually nothing." (AR 468.) Also, Dr. White's report, although noting plaintiff's reports of fatigue, is generally quite positive, particularly with respect to her success with anti-coagulation treatment. (*See* AR 371.) In addition, as noted by the ALJ, state agency reviewing physicians in November 2001 found no severe mental impairment and in April 2002 limited her to light work. (AR 337-56.) In sum, as indicated above, plaintiff does not demonstrate that the ALJ erred in his consideration of the opinions of Dr. Lewis.

Credibility Assessment

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834. "We require the ALJ to build an accurate and logical bridge from the evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between

his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

In this case, the ALJ rendered the following credibility assessment:

> As noted, I do not find the claimant or her laywitness [stet] to be completely credible. The claimant left her work several months prior to her cerebrovascular accident. After the stroke the claimant has remained active and involved. She does her own cooking, cleaning, shopping and driving. She is able to sing choral music well enough to be with a choir that has twice traveled out of state since her alleged onset. She is involved in card games and a book club. A year after her stroke, her sister, who was living with the claimant at the time, specifically stated that the claimant had no mental impairment. At that time, her daughter felt any memory problems were minor. At the hearing the claimant's daughter mentioned a number of mental problems in terms of memory and confusion, but memory testing revealed no significant impairments in memory or concentration.

(AR 21.)

Plaintiff asserts that the ALJ failed to provide clear and convincing reasons for discrediting her testimony. She notes that she had been laid off from her job six months prior to her stroke, received a length of service retirement, and did not claim disability until after her stroke. She further states that her attempt at working twenty hours a week at her church was unsuccessful. With respect to her various activities, plaintiff points to evidence in the record supporting her claim that they were sporadic, punctuated by periods of rest, and generally more difficult than they were prior to her stroke. Also, although she traveled out of state twice since her stroke – once to New Orleans for a family reunion and once to Los Angeles with her choir – she notes her previously very active lifestyle, including things like bowling and sporting events. Plaintiff also again points to evidence in the record supporting her claim of cognitive limitations.

While plaintiff does not lead as active a lifestyle as she did previous to her stroke, the ALJ

did not err in pointing to her post-stroke activities as calling into question her assertion of disability. Also, as stated above, the ALJ's decision finding no severe cognitive limitations is supported by substantial evidence. As such, the undersigned finds that the ALJ's credibility assessment withstands scrutiny.

Lay Witness Testimony

Lay witness testimony as to a claimant's symptoms or how an impairment affects ability to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each witness. *See Smolen*, 80 F.3d at 1288-89 (finding rejection of testimony of family members because, *inter alia*, they were "'understandably advocates, and biased'" amounted to "wholesale dismissal of the testimony of all the witnesses as a group and therefore [did] not qualify as a reason germane to each individual who testified.") (citing *Dodrill*, 12 F.3d at 918). *Accord Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("[L]ay testimony as to a claimant's symptoms is competent evidence that an ALJ must take into account, unless he or she expressly determines to disregard such testimony and gives reasons germane to each witness for doing so.")

Plaintiff first asserts that the ALJ erred in failing to give any reasons for dismissing the statement proffered by her pastor/former employer, Robert L. Manaway, Sr. (*See* AR 142-43.) She asserts that this statement provided first hand observations of her difficulty in working only twenty hours a week following her stroke.

In his letter, Manaway indicates that plaintiff spent the last two years working as the secretary for his church and states in relevant part:

> I affirm that Mary's stroke greatly diminished her quality of life. Before Mary had the

> stroke she as [stet] a very successful single mother, and a happy carefree individual. She spent the early years raising her son Joey. No one was as committed as Mary was with the task of mothering.
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> Mary was also a member of our Gospel choir. She would rock and clap at the same time back then. But after the stroke Mary was not able to be fully involved in many choir activities.
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> About six month [stet] after the stroke Mary came to work with me in the front office. It was here that I noticed her good and bad days. Some days her memory was sharp and quick. But on other days she labored to get through everyday task. [stet] I can tell you that being at the church and being responsible for important matters helped her get through some very difficult times. It was in this atmosphere that I noticed the greatest difference in her life.

(AR 142.)

Plaintiff next asserts that the ALJ did not consider the remaining witness information in the context in which it was provided, that is, noting changes in her functioning since the stroke. *See generally Regennitter v. Commissioner of Social Sec. Admin.*, 80 F.3d 1273, 1289 (9th Cir. 1996) (stating testimony from lay witnesses who see a plaintiff everyday is of particular value). Plaintiff asserts that, although reciting the testimony of those witnesses in the decision, the ALJ did not provide reasons germane to each witness. She also rejects the ALJ's contention that these statements conflicted with the medical evidence, asserting that they, instead, provide additional clarification.

The Commissioner concedes the ALJ's failure to specifically address Manaway's letter, but asserts that this omission was either acceptable entirely or at most harmless error. She cites *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984), for the proposition that the ALJ need not reject non-probative evidence. The Commissioner describes the statement as vague and of questionable value, asserting that is unclear what Manaway meant by plaintiff's "good and bad

days" or how she "labored." (AR 142.) With respect to the latter comment, the Commissioner points to plaintiff's testimony that she did not have any difficulty working the twenty hours a week at the church because she "could get up and walk as often as [she] needed" and her failure to mention having any cognitive difficulties. (AR 537.)

The Commissioner responds that the other lay witness statements were somewhat inconsistent, noting plaintiff's sister indicated both that plaintiff's mental functioning was impaired and unimpaired. (*See* AR 119-23 (stating in April 2002 that she had not recognized any mental or emotional problems) and AR 141 (indicating in June 2004 problems in mental alertness, speech, thought, and memory)). She further generally argues that the ALJ accurately concluded that the tenor of these statements conflicted with the medical evidence.

The Commissioner's reliance on *Vincent* is misplaced. As noted in *Van Nguyen*, the lay witnesses in *Vincent* offered diagnoses, which was not considered competent evidence, whereas lay testimony as to symptoms and how they affect an individual's ability to work is competent evidence. 100 F.3d at 1467. However, the undersigned agrees that the ALJ's failure to specifically address Manaway's letter was harmless and that the ALJ provided sufficient reasons for finding plaintiff's witness statements not completely credible.

The ALJ described in detail both the medical record and statements from plaintiff's sister, daughter, and friend. (AR 17-19.) He then concluded that, in the face of the "objective testing and objective medical opinion (as opposed to the likely accommodating nature of plaintiff's treating source opinions)[,]" he was "unable to accord significant probative weight to the supportive statements of claimant's lay witnesses." (AR 19.) He thereafter cites an extensive amount of case law to support his conclusion that "the lay testimony in this case cannot outweigh

[his] analysis of the objective clinical and laboratory evidence, and medical opinion of record, and of claimant's own credibility." (AR 19-21.) The ALJ added: "In other words, as the trier of fact in this matter, I find that the subjective elements of proof offered in this case, even with lay corroboration of activities and behavior, cannot carry claimant's burden of proof on disability." (AR 21.)

Also, as reflected above, the ALJ proffered criticisms specific to the testimonials of plaintiff's sister and daughter. (*See* AR 19 ("The claimant's sister specifically stated that the claimant had no mental problems when she completed a questionnaire concerning the claimant a year after the claimant's stroke. Two years later, she said that the claimant's condition had not changed, but reported numerous mental problems; this inconsistency reflects on the credibility of the testimony offered.") and AR 21 ("A year after her stroke, her sister, who was living with the claimant at the time, specifically stated that the claimant had no mental impairment. At that time, her daughter felt any memory problems were minor. At the hearing the claimant's daughter mentioned a number of mental problems in terms of memory and confusion, but memory testing revealed no significant impairments in memory or concentration.")) Although the ALJ did not include any individual reasons for rejecting the questionnaire and letter from plaintiff's friend, Rae Richardson, he outlined the content of the letter and it is apparent from his decision that he discounted the opinions contained therein as contrary to the medical evidence in the record. (*See* AR 18-21, 96-100, and 144.)

It is also apparent that, although he failed to outline Manaway's letter, the ALJ's reasoning for rejecting all of the witness statements was equally pertinent to the contents of that letter. That is, in the face of the medical evidence of record, the lay testimony was not afforded significant

probative weight. Therefore, the ALJ's failure to specifically address Manaway's letter was harmless. For these reasons, the undersigned concludes that plaintiff fails to demonstrate reversible error in the ALJ's consideration of her lay witnesses.

Vocational Expert

Finally, plaintiff argues that the ALJ should have called a vocational expert to testify given the limitations caused by her blood disorder – including her need to move around every two hours and rest for thirty minutes after that movement, as well as her cognitive limitations. She cites cases requiring the use of a vocational expert at step five where a claimant suffers from the non-exertional limitation of needing to alternate sitting and standing. *Tackett v. Apfel,* 180 F.3d 1094, 1103-04 (1999); *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir. 1991). *See also Burkhart v. Bowen*, 856 F.2d 1335, 1340-41 (9th Cir. 1988) (ALJ erred, after finding significant non-exertional limitations at step five, in that he "assumed the role of vocational expert himself[,]" thereby basing speculations on information outside the record, depriving plaintiff of the opportunity to cross-examine or rebut, and rendering a decision lacking evidentiary support). She also asserts that the ALJ erred in assuming she could perform her complex previous work without questioning a vocational expert as to the necessary cognitive requirements for that work. Plaintiff further avers that the ALJ failed to consider or mention the testimony of her daughter, who had direct knowledge given her position as a human resources manager for the same company, as to the requirements of the job and the reasons why her mother could not perform the work, as well as to her cognitive limitations generally. (*See* AR 544-49.)

The parties also, as explained above, dispute the propriety of the ALJ taking notice that most jobs provide for breaks at two-hour intervals and his consequent conclusion that plaintiff's

need to move every two hours would not interfere with her ability to perform that work.

As noted by the Commissioner and reflected in the cases relied on by plaintiff, the argument regarding plaintiff's alleged nonexertional limitations applies only at step five. Here, the ALJ concluded his decision at step four, where vocational expert testimony is discretionary. 20 C.F.R. § 404.1560(b)(2); *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993). Additionally, as noted above, the ALJ did take into consideration plaintiff's alleged need to move every two hours. (AR 22 (noting "most jobs allow a break every two hours" and stating that plaintiff's need to move every two hours would not interfere with her past work) (citing POMS DI 25020.010 B 2 (mental abilities required for any job include: "The ability to maintain concentration and attention for extended periods (the approximately 2-hour segments between arrival and first break, lunch, second break, and departure).")) *See also* SSR 96-9p (describing "2-hour intervals" in a workday.) The ALJ, therefore, did not err either in failing to call a vocational expert, or in taking notice as to the typical provision of breaks at two-hour intervals. Also, because he otherwise provided germane reasons for rejecting her testimony, the ALJ also did not err in not directly addressing the testimony of plaintiff's daughter as to plaintiff's former job responsibilities.

CONCLUSION

For the reasons described above, this matter should be AFFIRMED. A proposed order accompanies this Report and Recommendation.

DATED this 25th day of April, 2006.

Mary Alice Theiler
United States Magistrate Judge